

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

BONA FIDE CONGLOMERATE, INC.,  
Plaintiff,

V.

SOURCEAMERICA; PRIDE INDUSTRIES, INC.; KENT, CAMPA & KATE, INC.; SERVICESOURCE, INC.; JOB OPTIONS, INC.; GOODWILL INDUSTRIES OF SOUTHERN CALIFORNIA; LAKEVIEW CENTER, INC.; THE GINN GROUP, INC.; CORPORATE SOURCE, INC.; CW RESOURCES; NATIONAL COUNCIL OF SOURCEAMERICA EMPLOYERS; and OPPORTUNITY VILLAGE, INC.,

## Defendants.

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SOURCEAMERICA

#### **Counterclaimant.**

V.

BONA FIDE CONGLOMERATE, INC.;  
and RUBEN LOPEZ.

## Counterdefendants

Case No.: 3:14-cv-00751-GPC-AGS

## **ORDER:**

**(1) DENYING MOTION TO SEAL  
PREVIOUSLY FILED DOCUMENTS  
[ECF No. 536];**

**(2) GRANTING MOTIONS FOR  
LEAVE TO FILE EXCESS PAGES  
[ECF No. 542, 554]:**

**(3) DEFERRING RULING ON MOTIONS TO FILE DOCUMENTS UNDER SEAL [ECF No. 544, 547, 551, 556];**

**(4) DENYING MOTION TO STRIKE  
BONA FIDE'S OPPOSITION TO  
SOURCEAMERICA'S MOTION  
FOR SUMMARY JUDGMENT  
[ECF No. 563]; and**

**(5) GRANTING MOTION TO FILE  
UNTIMELY MEMORANDUM [ECF  
No. 567]**

1           The parties in this case recently filed several administrative motions. (ECF Nos.  
2 536, 542, 544, 547, 551, 554, 556, 563.)

3           **I.       SourceAmerica’s Motion to Seal Previously Filed Document (ECF No. 536)**

4           On July 13, 2018, SourceAmerica filed, *inter alia*, a motion to exclude (the  
5 “MTE”) one of Bona Fide’s experts (ECF No. 521) and a motion for summary judgment  
6 (the “MSJ”) (ECF No. 527). According to the current motion, it has “come to  
7 SourceAmerica’s attention that certain portions of the documents that SourceAmerica  
8 filed . . . contain confidential information that was inadvertently not redacted or replaced  
9 with a slip-sheet.” (ECF No. 536 at 5.) As a result, SourceAmerica now moves for leave  
10 to file portions of those filings under seal and re-file redacted versions of those  
11 documents. The documents SourceAmerica seek to redact are (1) a statement in support  
12 of the MSJ (ECF No. 527-2); (2) Exhibits A–D, F–H, J–M, and O–Q to Kevin  
13 Alexander’s declaration in support of the MSJ (ECF No. 527-4); (3) Thomas Hawkins’s  
14 declaration in support of the MSJ (ECF No. 527-5); (4) Exhibits 1 and 2 to Mary Karen  
15 Wills’ declaration in support of the MSJ (ECF No. 527-9); (5) Thomas Hawkins’s  
16 declaration in support of the MTE (ECF No. 521-2); and (6) Exhibits 2–5 to J. Daniel  
17 Holsenback’s declaration in support of the MTE (ECF No. 521-4). As a cautionary  
18 matter, the Court restricted access to these filings while this motion was pending.

19           According to SourceAmerica, the information at issue should be sealed because  
20 (1) it is designated as “Confidential” under the Second Amended Protective Order in this  
21 case, and (2) it discusses information about responses to the federal government’s  
22 Opportunity Notices for the AbilityOne Program at issue in this case. (ECF No. 536 at  
23 6.) The first assertion—the fact that SourceAmerica has designated this information  
24 “Confidential” during the discovery process requires that the information be sealed—is  
25 incorrect. The Court addressed this issue recently:

26           The Court finds it necessary to note that it rejects SourceAmerica’s assertion  
27 that the fact that, during discovery, counsel happened to mark certain  
28 documents “confidential” or “confidential – for counsel only” is not a  
compelling reason to seal documents filed with the Court. Under the Second

1 Amended Protective Order in this case, the parties agreed to designate as  
2 confidential information they “believe[] should be subject to this Protective  
3 Order.” (ECF No. 482-1 at 4.) Just because a party believes a particular  
4 document is, for example, trade secret information does not make it so.  
Whether sealing a particular document is appropriate is a determination for  
the Court, not the parties, to make.

5 (ECF No. 540 at 3.) SourceAmerica’s second ground, however, is a proper basis for  
6 sealing such information. As this Court has also recently explained:

7 the policy of protection envisioned in the Procurement Integrity Act, Federal  
8 Acquisition Regulations, and Trade Secrets Act demonstrate that the  
9 information [discussed in these documents] amounts to trade secret  
information. This is because the AbilityOne Program, the program at issue  
10 in this case, uses this information to select procurement bids. The Ninth  
11 Circuit has recognized the protection of trade secret information as a  
compelling reason to seal court filings. *Kamakana v. City & Cty. of*  
12 *Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006). And as courts have  
13 recognized, public disclosure of procurement bid information threatens the  
integrity and efficiency of the government procurement process. Cf. *Metric*  
14 *Sys. Corp. v. United States*, 13 Cl. Ct. 504, 506–07 (1987).

15 (ECF No. 540 at 2.) This ground would therefore have been a compelling reason to keep  
16 the information at issue redacted if SourceAmerica had asked for such relief before filing  
17 it. But SourceAmerica failed to do so. Now, SourceAmerica asks the Court seal  
18 documents that were publicly available for at least eleven days prior to its filing of this  
19 motion. The Court finds such relief inappropriate under these circumstances.

20 This Court has previously denied a similar request by SourceAmerica to redact,  
21 retroactively, information publicly available on this Court’s docket. In 2015,  
22 SourceAmerica asked the Court to redact information from several of Bona Fide’s filings  
23 and one of the Court’s rulings on the basis that it contained attorney-client privileged  
24 information. (ECF No. 207.) The Court found that, even assuming that this information  
25 was privileged, the Court’s retroactive sealing of this information would not be  
26 appropriate. (ECF No. 233 at 15–19.) It emphasized that “in the age where everything is  
27 almost instantly accessible” on the internet, “it is particularly difficult to pull back  
28 confidential or privileged information.” (*Id.* at 16.) In other words,

1 “[w]hen . . . information is publicly filed, what once may have been trade secret no longer  
2 will be.” *Apple, Inc. v. Samsung Elecs. Co., Ltd.*, No. 11-cv-01846-LHK, 2012 WL  
3 4936595, at \*5 (N.D. Cal. Oct. 17, 2012). More generally, courts have often been  
4 skeptical of requests to seal information that has already been made public. *See TrQuint*  
5 *Semiconductor, Inc. v. Avago Techs. Ltd.*, No. CV-09-1531-PHX-JAT, 2012 WL  
6 1432519, at \*7 (D. Ariz. Apr. 25, 2012) (“[C]ontrary to the basis for the standard in  
7 *Kamakana*, there is no longer a favorable *presumption* of public access; rather there *is*  
8 public access.”); *Pfizer, Inc. v. Teca Pharm. USA, Inc.*, Nos. 08-1331 (DMC), 08-2137  
9 (DMC), 2010 WL 2710556, at \*4 (D.N.J. Jul. 7, 2010) (“Ex-post facto sealing should not  
10 generally be permitted.”); *see also Gambale v. Deutsche Bank AG*, 377 F.3d 133, 144 (2d  
11 Cir. 2004) (“But however confidential it may have been beforehand, subsequent to  
12 publication it was confidential no longer.”). *But see Rich v. Schrader*, No. 09-cv-652-  
13 AJB (BGS), 2013 WL 6028305 (S.D. Cal. Nov. 13, 2013); *Richardson v. Mylan Inc.*, No.  
14 09-cv-1041-JM (WVG), 2011 WL 937148 (S.D. Cal. Mar. 9, 2011).

15       Retroactive sealing is particularly inappropriate here, where it was  
16 SourceAmerica’s own conduct that is the reason for the public dissemination of this  
17 information. It was SourceAmerica who filed this information on the public docket.  
18 What’s more, according to the declaration filed by SourceAmerica’s attorney James  
19 Hawley, even after SourceAmerica’s attorneys realized their mistake, they waited another  
20 four days to contact Bona Fide about it, and five days to file the instant motion. (*See*  
21 ECF No. 536-2 ¶¶ 2–4.) While the period of public disclosure in this instance is  
22 significantly shorter than the period at issue in the Court’s previous order denying this  
23 type of relief, the analysis is essentially the same: during the eleven days that information  
24 sat on the public docket, “the proverbial cat [left] the bag and [now] cannot be put back  
25 in.” (ECF No. 233 at 17.)

26       Because the Court finds retroactive sealing of these documents inappropriate under  
27 these circumstances, the Court need not address Bona Fide’s alternative arguments that  
28 neither the relevant statutes and regulations nor public policy present compelling reasons

1 for sealing procurement and source selection information after bids have been awarded in  
2 the AbilityOne program. (ECF No. 562 at 7–11.) These arguments, however, raise  
3 important issues that might call into question whether sealing this information is  
4 appropriate in the first place. As discussed below, the Court will order SourceAmerica to  
5 respond to these new arguments.

6 **II. Motions for Leave to Exceed Page Limitations (ECF Nos. 542 and 554)**

7 SourceAmerica moves to exceed the “cumulative” page limitation set in the  
8 Court’s Local Civil Rule 7.1(h), which states that “[b]riefs or memoranda in support of or  
9 in opposition to all motions noticed for the same motion day must not exceed a total of  
10 twenty-five (25) pages in length, per party, for all such motions without leave of the  
11 judge who will hear the motion.” SourceAmerica seeks leave from this limitation to file  
12 its (1) opposition to Bona Fide’s motion for summary judgment and (2) opposition to  
13 Bona Fide’s motion to exclude the testimony of SourceAmerica’s expert witness Mary  
14 Karen Wills. (ECF No. 542 at 2.) Neither of the two oppositions is individually more  
15 than 25 pages in substance. (*Id.*) The Court granted similar previous requests from the  
16 parties, explaining that the Court made a deliberate choice to hear these motions on the  
17 same day. (ECF No. 533 at 2.) For the same reason, the Court finds good cause to grant  
18 SourceAmerica leave from the cumulative page total limitation in Local Civil Rule  
19 7.1(h).

20 Bona Fide and Counterclaim-Plaintiff Ruben Lopez seek leave from the same  
21 limitation to file oppositions to SourceAmerica’s motions (1) for summary judgment on  
22 SourceAmerica’s counterclaim, (2) to exclude the testimony of Bona Fide’s expert  
23 witness Kevin Jans, and (3) summary judgment on Bona Fide’s claims. (ECF No. 554.)  
24 The first two oppositions are less than 25 pages in substance. The third opposition,  
25 however, is 44 pages in substance. (ECF No. 555.) SourceAmerica opposes the request  
26 for leave to file this oversized memorandum. (ECF No. 564 at 8–10.) It argues that the  
27 length of the memorandum is unnecessary, and it offers a few examples of instances in  
28 which Bona Fide’s arguments are, according to SourceAmerica, “frivolous.” The Court

1 nonetheless finds it appropriate to permit Bona Fide to submit the memorandum as filed.  
2 If the arguments found therein are frivolous as SourceAmerica claims, it will not take  
3 significant time for SourceAmerica to respond to them.

4         SourceAmerica separately asks that if the Court permits Bona Fide's oversized  
5 memorandum, that the Court extend SourceAmerica's deadline to file its reply by one  
6 week. In light of the fact that the Court recently continued the hearing on these motions,  
7 the Court finds good cause to extend the deadline for filing a reply. **All reply**  
8 **memoranda relating to the substantive motions referenced in the Court's original**  
9 **briefing schedule (ECF No. 533) may be filed no later than August 24, 2018.**

10         **III. Motions to Seal (ECF Nos. 544, 547, 551, and 556)**

11         The parties have also filed several motions to file documents under seal and/or  
12 redact information in publicly filed documents. In ECF No. 544, Bona Fide and Lopez  
13 seek to file under seal information included in their memorandum in opposition to  
14 SourceAmerica's summary judgment motion (ECF No. 543); an exhibit attached to  
15 Lopez's declaration in support of that opposition (ECF No. 543-2 at 6); exhibits attached  
16 to Joseph Ergastolo's declaration in support of that opposition (ECF No. 543-1 at 5–11);  
17 and portions of their responsive statement of undisputed facts (ECF No. 543-3). The only  
18 basis for sealing mentioned in the motion is that SourceAmerica marked this information  
19 as confidential during discovery. (ECF No. 544 at 3.) As discussed above, however, that  
20 is not a basis for filing the information under seal. **As the Court has previously done**  
21 **under these circumstances (see ECF No. 533), the Court orders SourceAmerica to**  
22 **file a memorandum within fourteen days explaining the compelling need to seal**  
23 **such information.**

24         In ECF No. 547, Bona Fide seeks to redact portions of (1) its memorandum in  
25 opposition to SourceAmerica's motions to exclude Kevin M. Jans's testimony (ECF No.  
26 546), and (2) a declaration by Jans in support of that opposition, along with several  
27 exhibits (ECF No. 546-1). Again, Bona Fide's only reason for sealing this information is  
28 that SourceAmerica marked it confidential during discovery. (ECF No. 547 at 2.) While

1 the Court presumes that SourceAmerica will take the position that this information  
2 constitutes trade secrets because it discusses particular bids for specific AbilityOne  
3 Program projects, it appears to the Court the information at issue here speaks only to  
4 SourceAmerica's actions in its selection procedure, rather than the information contained  
5 in the bids. **As a result, also in the memorandum discussed immediately above,  
6 SourceAmerica shall explain the need to seal this information. If SourceAmerica  
7 asserts that this information contains confidential information because it includes  
8 specific details of procurement bids, SourceAmerica must also respond to (1) the  
9 Court's skepticism that any such information is actually contained in these excerpts,  
10 and (2) the arguments presented by Bona Fide at ECF No. 562 at 7–11.**

11 In ECF No. 551, SourceAmerica asks to redact information from (1) exhibits to J.  
12 Daniel Holsenback's declaration in support of SourceAmerica's opposition to the motion  
13 to exclude Wills's testimony (ECF No. 550-2 at 6–8); its memorandum in opposition to  
14 Bona Fide and Lopez's motion for summary judgment (ECF No. 549); its separate  
15 statement of undisputed facts in support of that opposition (ECF No. 549-3); and exhibits  
16 attached to Kevin W. Alexander's declaration in support of that opposition (ECF No.  
17 549-2 at 31–33). As for the first of these four documents, SourceAmerica argues that this  
18 information should be sealed because it contains details of responses to AbilityOne  
19 Program bids. (ECF No. 551 at 12–13.) The Court defers a ruling on this assertion until  
20 it reviews SourceAmerica's responses to Bona Fide's arguments discussed above. As for  
21 the remaining information, SourceAmerica argues that it should be sealed because it is  
22 information relayed by Robinson during her allegedly surreptitiously recorded  
23 conversations with Lopez. (*Id.* at 14–15.) However, almost all of the information at  
24 issue here pertains not to the content of those conversations, but rather Lopez's acts of  
25 recording them. SourceAmerica does not explain why such information should be sealed.  
26 **In the memorandum the Court has ordered SourceAmerica to file above, it shall  
27 discuss the need to redact this information as well.**

28 Last, in ECF No. 556, Bona Fide moves to seal information from its memorandum

1 in opposition to SourceAmerica's motion for summary judgment (ECF No. 555); its  
2 responsive statement of undisputed facts (ECF No. 557); a declaration by Ergastolo and  
3 exhibits attached in support of that opposition (ECF Nos. 557-1, 557-2); a declaration by  
4 Lopez and exhibits attached in support of that opposition (ECF Nos. 557-3, 557-4); its  
5 objections to evidence offered by SourceAmerica (ECF No. 555-2); and a declaration by  
6 Jans and exhibits attached in opposition to SourceAmerica's motion for summary  
7 judgment (ECF No. 555-1). The only reason Bona Fide offers in support of the sealing  
8 motion is that SourceAmerica has marked this information as confidential. **Again, the**  
9 **Court orders SourceAmerica to explain why this information presents a compelling**  
10 **case for redaction in the memorandum discussed above.**

11 \* \* \*

12 The Court understands the parties' interests in keeping some of this information  
13 confidential. But their attorneys' practices in seeking redactions from the filings in this  
14 case have become a significant drain on this Court's resources (and, likely, the parties'  
15 resources as well). **The Court hereby orders that, in the future, any time a party**  
16 **seeks to seal information based on the opposing party's designation of such**  
17 **information as confidential, the moving party shall obtain a written explanation**  
18 **from the opposing party of why that information should be sealed.** The written  
19 explanation must be filed as an attachment to the motion to seal. The Court will reject  
20 any motion to seal, based on opposing counsel's designations, that does not contain such  
21 a written explanation.

22 **IV. Motion to Strike (ECF No. 563) and Motion for Leave to File Untimely**  
23 **Memorandum (ECF No. 567)**

24 As discussed above, Bona Fide has filed a 44-page memorandum opposing  
25 SourceAmerica's motion for summary judgment. (ECF No. 555.) The deadline to file  
26 this memorandum was August 3, 2018. (ECF No. 533 at 2.) Bona Fide filed it at 3:17  
27 a.m. on the morning of August 4. At ECF No. 563, SourceAmerica moves to strike this  
28 "unexcused, untimely opposition." At ECF No. 567, Bona Fide seeks leave to file the

1 memorandum. Bona Fide states that its attorneys miscalculated the amount of time it  
2 would take to file responses to SourceAmerica's motions, particularly in light of  
3 SourceAmerica's assertions that much of the relevant information at issue in this case is  
4 confidential.<sup>1</sup> In light of the fact that Bona Fide's opposition was filed just a few hours  
5 after the deadline, the Court finds good cause to permit the filing. The Court GRANTS  
6 Bona Fide's motion to file an untimely memorandum and DENIES SourceAmerica's  
7 motion to strike.

8 **V. Conclusion**

9 For the reasons stated above, the Court issued the following rulings:

- 10 • SourceAmerica's motion to seal previously filed documents (ECF No. 536) is  
11 **DENIED**.
- 12 • Bona Fide's motions for leave to file excess pages (ECF Nos. 542, 554) are  
13 **GRANTED**.
- 14 • The Court defers a ruling on the motions to file documents under seal (ECF Nos.  
15 544, 547, 551, 556). **Within fourteen days of the date of this order,**  
16 **SourceAmerica shall file a memorandum (1) explaining the need to seal the**  
**information at issue, and (2) responding to Bona Fide's arguments that this**  
**information need not be sealed (see ECF No. 562 at 7–11).**
- 17 • SourceAmerica's motion to strike Bona Fide's opposition memorandum (ECF No.  
18 563) is **DENIED**.
- 19 • Bona Fide's motion for leave to file an untimely memorandum (ECF No. 567) is  
20 **GRANTED**.
- 21 • All reply memoranda relating to the substantive motions discussed in the Court's  
22 order setting forth the relevant briefing schedule (ECF No. 533) shall be filed on or  
23 before **August 24, 2018**.

24 //

25 \_\_\_\_\_  
26  
27 <sup>1</sup> Bona Fide also blames the Court's "shortening" of Bona Fide's time to respond to SourceAmerica's  
28 motions. To the extent that the Court's briefing schedule provided Bona Fide insufficient time to  
respond to SourceAmerica's motions, Bona Fide was obligated to ask for an extension of the Court's  
deadline prior to its expiration.

1           **IT IS SO ORDERED.**

2           Dated: August 13, 2018

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4           Hon. Gonzalo P. Curiel  
5           United States District Judge

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